Filed 4/18/19 P. v. Bickford CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM HOUSTON BICKFORD, Defendant and Appellant.	F074621 (Super. Ct. No. VCF331557) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Lloyd L. Hicks, Judge. (Retired judge of the Tulare County Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

After an assault on a developmentally disabled woman, a jury found William Houston Bickford guilty of rape, sexual penetration with a foreign object, kidnapping for the purpose of rape, and four related charges. The rape and sexual penetration counts were enhanced with a kidnapping special circumstance.

Bickford now argues that the evidence presented at trial was insufficient to prove rape or sexual penetration with a foreign object. Specifically, he argues that there was no evidence that he used force, violence, duress, menace, or fear of immediate bodily injury to carry out those offenses. We disagree, as there was evidence of force of the most straightforward sort: The victim testified that Bickford forced her legs apart as she tried to keep them together before inserting his fingers and penis into her vagina.

Bickford also argues that the evidence was insufficient to prove kidnapping or the kidnapping special circumstance because there was no showing that he used force, fear or deception when he led the victim to the spot where the assault took place. With this point we agree.

We reverse the kidnapping conviction and the kidnapping special circumstance findings, and remand for resentencing.

FACTS AND PROCEDURAL HISTORY

The district attorney filed an information charging Bickford as follows:

Count 1: Rape by force (Pen. Code, § 261, subd. (a)(2))[1]

Count 2: Sexual penetration with a foreign object by force (§ 289, subd. (a)(1))

Count 3: Kidnapping to commit rape (§ 209, subd. (b)(1))

Count 4: Sexual penetration of a person incapable of giving legal consent because of a mental disorder or developmental or physical disability (§ 289, subd. (b))

Count 5: Felony sexual battery (§ 243.4, subd. (a))

---

[1] Subsequent statutory references are to the Penal Code unless otherwise noted.

Count 6: Rape of a person incapable of giving legal consent because of a mental disorder or developmental or physical disability (§ 261, subd. (a)(1))

Count 7: Misdemeanor sexual battery (§ 243.4, subd. (e)(1))

All counts except the misdemeanor in count 7 were charged as second strikes (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), based on a 1987 Oregon rape case. Counts 1 and 2 included two special-circumstance allegations under section 667.61, carrying sentences of 25 years to life: (1) Bickford had a prior enumerated sex offense or an equivalent offense in another jurisdiction (§ 667.61, subd. (d)(1)); and (2) Bickford kidnapped the victim of the present offenses and the movement substantially increased the risk of harm (§ 667.61, subd. (d)(2)). The alleged prior sex offense was the same as the alleged prior strike, the 1987 Oregon rape case. For purposes of a prior prison term enhancement under section 667.5, subdivision (a), the information also alleged that Bickford had a 2013 conviction for carrying a concealed dirk or dagger, and thus had not remained free of additional felony convictions for 10 years after his 2007 release in the prior rape case.

The 1987 case was described in Oregon records submitted to the trial court (and admitted into evidence at trial). On November 18, 1987, Bickford was found "[g]uilty except for insanity" of first degree rape in Marion County Circuit Court. The judgment was entered pursuant to a plea agreement in which a count of first degree sodomy was dismissed. The verdict was based on two psychologists' evaluations concluding that Bickford was "affected by mental disease or defect." In the judgment, the court recited the meaning of the verdict: Bickford "committed the acts alleged in the indictment," but "at the time of [those acts], [he] was not able to appreciate the criminality thereof and was not able to conform his conduct to the requirements of the laws and is, therefore, not legally responsible for his action." The court found Bickford presented a substantial danger to others, placed him under the jurisdiction of the Oregon Psychiatric Security Review Board, and committed him to a state mental hospital for an indeterminate period

of no more than 20 years. During Bickford's confinement at the hospital, the review board issued several orders denying him early release on the ground that he continued to be a danger to others and could not be adequately treated and controlled in the community. One of these orders, from 1993, recited a psychiatrist's description of Bickford's condition. "[A]n organic mental disorder, not otherwise specified, as well as mild mental retardation and antisocial personality disorder." The psychiatrist also stated that Bickford was a "predatory sexual offender." The last review board order denying his release and finding him to be still a danger to others was issued in 2006, but he was discharged one year later because 20 years had passed and the review board's jurisdiction had therefore expired.

The facts of the present offenses, stated in the light most favorable to the judgment, are these:

L.N., 21 years old at the time of trial in 2016, was diagnosed with spinal meningitis at the age of six months and attended special education classes throughout her time in school. In adulthood, she showed strong indications of brain damage. She experienced dysregulation of her emotions and behavior, and had impaired executive functioning that severely affected her ability to plan and organize her activities. According to a psychological evaluation prepared for purposes of this case, she had a below-average verbal IQ score of 76, and performed at the level of a person seven years and one month old on a test of visual motor integration. She lived in the community in a supervised setting and received Supplemental Security Income payments. She also received services from the Central Valley Regional Center on the basis of mental retardation or intellectual disability. A case manager at the Central Valley Regional Center described L.N. as "very childlike." The psychological evaluator opined that L.N. "is, in general, not able to consent to sexual intercourse." In the future, with counseling, she might be able to consent to sexual intercourse in "a loving relationship," but "not with a stranger, not in public." It was also his opinion that, having been sexually,

physically, and emotionally abused often before, and having little ability to act in a self-protective manner, L.N. would not know how to protect herself when confronted with sexual advances by an unfamiliar man. "[S]he would simply shut down," he said.

On June 9, 2015, L.N. was at a Walmart store shopping for beads and drawing supplies. Bickford was there. This was not the first time she had seen him. She had encountered him twice previously at a bus stop. On one of these occasions, Bickford held her hand, kissed her using his tongue, and touched her breast. She did not like this; she was scared and told him to stop. He asked her if she wanted to go to his house and lie on his bed. She said no. He asked if she would have lunch with him. She said no and left on the bus.

Inside the Walmart, L.N. recognized Bickford when he came over to where she was standing in the art supply section. He asked if he could touch her. She did not remember at trial what her answer was, except that she did not say yes. He touched her breasts anyway. She did not like it. She did not tell him to stop, but she moved her shoulders around in an effort to shake him off while continuing to look at the art supplies.

In a surveillance video shown to the jury, L.N. was seen standing in an aisle, examining items on a shelf, when Bickford walked up and hugged her. The view, which was from the ceiling, was partly obstructed by that shelf, and the quality of the image was insufficient to make out details. It could be seen, however, that Bickford stood with L.N. there for about 15 minutes, during which time the two of them appeared to be talking and interacting. A number of times, Bickford put his arms around L.N., or put his hands on her, or put his head near hers as if kissing her. Finally, L.N. walked out of the aisle and out of the frame of the video. Bickford followed her, pushing her shopping cart.

L.N. went to the checkout and Bickford went with her. She did not have enough money for all her items, so he paid for some markers for her.

L.N. left the store and Bickford followed. Outside, he asked her if she wanted to go to his house and have sex in his bed. She said no, but then they walked behind the

store together. The jury was shown surveillance video of the two of them leaving the store and walking around the corner of it to the back. They walked side by side, sometimes talking to each other. Nothing visible in the video indicated that Bickford was coercing L.N. to go with him.

They stopped at a place behind the building near some trash bins. Bickford asked L.N. if she wanted to have sex there. L.N. did not answer. She did not want to have sex with him, but he looked scary and she was frightened. She was afraid he would hit her if she did not do it, although he did not say he would hit her or make any other threatening remarks.

Bickford pulled his pants down and pulled L.N.'s pants down. He laid L.N. down on the ground and tried to put his penis in her vagina. It went in only a little way, and Bickford started to get mad because he could not get L.N. into the position he wanted. L.N. was moving around while this was happening because it hurt and she wanted it to stop. But she did not scream, ask for help, or try to run away because she was still afraid he would hit her. He looked angry.

Bickford tried again in a different position. L.N. tried to hold her legs closed, but Bickford pulled them open with his hands. He grasped one of her legs and put two fingers inside her vagina. Then he put his penis inside her vagina again, kept it there for a number of minutes, and ejaculated. When it was over, L.N. tried to get up, but Bickford was kneeling over her and she felt he was trying to keep her down. Then they both got up and she put her pants back on. She walked away, and he walked with her some distance. Then they separated and she went back into the store.

L.N. located an employee with whom she was acquainted and told her she had been raped. Another employee took L.N. to the back of the store and had her call the police. L.N. told the 911 operator she had been raped and gave a description of Bickford.

The police found Bickford and questioned him the same day. At first, when a detective asked what he had done at Walmart that day, Bickford told a story about a

woman outside asking to use his phone. He lent it to her and she made a call; then a man carrying a bow and arrow appeared. The woman gave Bickford his phone back and began talking with the man. Bickford left them and walked to a bus stop, where the police picked him up. The detective replied that there was surveillance video and it conflicted with this story, so Bickford should tell him what happened with L.N.

Bickford said he saw L.N. outside Walmart and then in the store looking at markers and gave her a hug. They went to the checkout together and he helped her pay. Then they left the building, walked around to the side of it, and had sex:

> "Okay. Then, um, after that, I said, 'You know, you want to go and—somewhere and talk?' And, uh, she said, 'Yeah,' said 'that sound[s] good.' So we went to the side of the Wal-Mart and I asked her, I go, 'Do you mind if I give you a kiss?' And she goes, 'No.' So I—I kissed her. And then, um, after that, we made love."

Bickford told the detective he did not tell this story in the first place because of his previous experience of being accused of rape and locked up. "I was nervous because of my past, you know, what—what happened in my past."

Bickford asserted that he did not force L.N.; he asked her "more than twice" if she wanted to do it, and she said yes. When he kissed her, she kissed him back. When he suggested moving to a more private spot, she agreed and followed behind him. When they got there, she agreed it was private enough. He raised her shirt and asked her to pull her pants down, which she did. He rubbed her vagina, and then they had intercourse. She did not tell him to stop. He withdrew and ejaculated on the ground. He asked her if it was good, and she said yes. They agreed to meet at the store the next day at 4:00 p.m. and parted company.

The detective asked whether Bickford noticed that L.N. seemed to have "diminished mental capacity," or to be "a little slow" or "mentally challenged." Bickford denied it. Another detective joined in the interrogation and pressed Bickford on this

point. Bickford conceded he realized "[p]robably a little bit" that L.N. was intellectually disabled.

The second detective also returned to the question of whether L.N. really agreed to have sex with Bickford. Bickford admitted that all she really agreed to was to go somewhere more private, not to have sex. When he suggested having sex, she did not say no, but she also did not say yes. He conceded that if she had wanted to have sex, she probably would have said yes, although he did not understand why she did not say no, and would have stopped if she had. Finally, under close questioning, he admitted that, while he thought it would be okay at the time because she did not say no, he now realized it was probably not appropriate for him to have sex with her and he made a mistake.

At the end of the interrogation, Bickford said, "My whole life is just out the door now, huh?"

Bickford was booked into jail. The next day, one of the detectives questioned him again. The detective said he had looked into the Oregon case and found similarities between it and the present case. He said, "[T]he two young ladies were similar in that they were developmentally, you know, slow, right?" Bickford said, "Yeah." The detective asked him if he had an interest in developmentally disabled women because he lacked self-esteem. Bickford agreed that this was so, and said the problem arose from abusive circumstances in his family when he was young, the failure of his family ever to visit or write to him during his confinement in the state hospital, and their disinclination to reconcile with him when he was released. He wanted to feel wanted and needed, and said yes when the detective asked if developmentally disabled women appealed to him because they might more readily accept him. He admitted he knew L.N. was intellectually disabled before he had sex with her; and he realized it was wrong after:

> "Bickford: You know, but yet I thought that, hey it was wrong. Afterwards.

"[Detective]: And you knew it was wrong because you know she was mentally slow?

"Bickford: Yeah, like I realized that—

"[Detective]: Mm-hmm.

"Bickford: —afterwards.

"[Detective]: You realized that. Well, you realized that she was mentally slow before but you realized afterwards that it was a mistake, right?

"Bickford: That's right. That's right.

"[Detective]: Even though—but you were blinded—you were blinded by, you know, your ambition for those feelings, you think?

"Bickford: Yeah.

"[Detective]: You just wanted to feel good.

"Bickford: I just wanted to feel needed.

"[Detective]: Right.

"Bickford: Um, and when a person wants to feel needed or appreciated or whatever, they do stupid things.

"[Detective]: Sure.

"Bickford: You know, and that was one of the biggest stupid things that anybody could ever possibly do."

At trial, Bickford confirmed his story up to the point when L.N. went with him to the more private spot. He recanted the rest, saying there was no sexual contact or inappropriate touching. In the private spot, he only held her and kissed her and they talked. He said he did not realize L.N. had a disability until the police told him so.

When examined and cross-examined about his inculpatory statements to the police, he variously denied making them, said he did not remember making them, or claimed he made them falsely, as a reaction to anxiety he began to feel when the questioning brought back memories of the prior rape case. He said he was wrongly

accused in the prior case. He knew the victim in that case and knew she had an intellectual disability, but he did not commit any kind of sexual assault against her.

The prosecutor questioned Bickford in detail about a prior uncharged incident in which he was accused of sexually assaulting yet another intellectually disabled woman, around the same time as the prior rape. Bickford denied having any knowledge of this incident. The prosecution never produced any evidence of it, and the jury was instructed that the prosecutor's questions were not evidence.

The jury found Bickford guilty on each count, and found true the kidnapping special circumstance allegations. A court trial was held to determine the truth of the prior rape allegation, for purposes of both the prior sex offense special circumstance and the second strike. As soon as this proceeding got underway, it became apparent that there were difficulties. The trial court noticed for the first time that the judgment in the 1987 Oregon rape case was "guilty except for insanity." (See Ore. Rev. Stats. § 161.295.) The court inquired whether this had the same effect as an ordinary guilty verdict for purposes of determining whether there was a prior conviction. The prosecutor said it did, and defense counsel said it did not, but neither produced any authority on the matter.[2]

---

[2] In California, a verdict of not guilty by reason of insanity is not a conviction. (*In re Merwin* (1930) 108 Cal.App. 31, 32.) Oregon's insanity verdict is not equivalent to California's. In California, a court or jury finds that a defendant is not guilty by reason of insanity because he or she "was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (§ 25, subd. (b).) In Oregon, a court finds that a defendant "lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law." (Ore. Rev. Stats. § 161.295.) This is a version of the classic contrast between the M'Naghten rule and the Model Penal Code rule for insanity verdicts. (See, e.g., *People v. Kelly* (1973) 10 Cal.3d 565, 574; *id* at p. 581 [conc. opn. of Mosk, J.].) The key difference between them as relevant here is that the M'Naghten approach (like California's) requires a finding that the defendant did not appreciate the criminality of the act or did not know right from wrong, while the Model Penal Code approach (and Oregon's) permits an insanity verdict based on a finding that, even if the defendant *did* appreciate the criminality of the act (and regardless of whether he or she knew right from wrong), he or she was incapable of conforming his or her

Next, defense counsel pointed out a difficulty in determining whether the rape statute under which Bickford was found guilty of rape except for insanity, Oregon Revised Statutes section 163.375, had the same elements as any serious felony listed in Penal Code section 1192.7, subdivision (c), and thus whether it could count as a prior strike. (See §§ 667, subd. (d)(2), 1170.12, subd. (b)(2).) No one said so, but the same problem existed for the prior sex offense special circumstance, which required the prior offense to have all the elements of any offense listed in section 667.61, subdivision (c). (See § 667.61, subd. (d)(1)). The Oregon statute provided as follows:

> "(1) A person who has sexual intercourse with another person commits the crime of rape in the first degree if:
>
> "(a) The victim is subjected to forcible compulsion by the person;
>
> "(b) The victim is under 12 years of age;
>
> "(c) The victim is under 16 years of age and is the person's sibling, of the whole or half blood, the person's child or the person's spouse's child; or
>
> "(d) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.

---

behavior to the law. If the finder of fact in Bickford's Oregon case had found Bickford was insane only because he could not conform his behavior to the law—and not because he did not appreciate the criminality of the act—then the insanity verdict there would *not* be equivalent to a verdict of not guilty by reason of insanity in California, but would instead be equivalent to a guilty verdict, since being unable to conform to the requirements of the law is not a criterion of insanity in California. Conversely, if the Oregon court had found Bickford did not appreciate the criminality of his act, then the verdict would be equivalent to a California verdict of not guilty by reason of insanity. The court records from Oregon did not include any finding regarding which of the two reasons was the basis of the verdict, and did not need to do so because verdict was the result of a plea bargain, so the trial court in this case had no way of knowing whether the Oregon judgment was equivalent to a California judgment of guilty or one of not guilty by reason of insanity. Consequently, the evidence submitted to the trial court in this case could not establish that Bickford had a prior conviction of the equivalent of any California offense.

"(2) Rape in the first degree is a Class A felony." (Ore. Rev. Stats. § 163.375.)

Defense counsel argued that, because the records received from Oregon did not specify whether Bickford's crime was under Oregon Revised Statutes section 163.375, subdivision (1)(a), (1)(b), (1)(c), or (1)(d)—and because subdivision (1)(c), was not equivalent to rape as defined in California, or any of the other offenses enumerated in Penal Code section 1192.7, subdivision (c)—the court could not find that the Oregon offense was a serious felony and consequently could not treat it as a prior strike. It could also have been said that subdivisions (1)(c) and (1)(d) of the Oregon statute did not correspond to any of the offenses listed in Penal Code section 667.61, subdivision (c), so Bickford's prior offense could not be the basis of a prior sex offense special circumstance finding.

After this colloquy, the court took a recess. After the recess, and without further discussion, the prior offense allegation based on the Oregon case was dismissed at the prosecutor's request. Consequently, there was no true finding on that allegation, and the offense could not form the basis of the prior strike enhancement, the prior sex offense special circumstance enhancement, or the section 667.5, subdivision (a) enhancement.[3]

The court therefore sentenced Bickford on the basis of the guilty verdicts and the kidnapping special circumstance. It imposed consecutive sentences of 25 years to life on counts 1 and 2, plus the four-year determinate upper term on count 5, also consecutive. The court specified sentences on counts 3, 4 and 6, and stayed them pursuant to section 654. On the misdemeanor in count 7, the court did not impose any time. The aggregate sentence thus was 54 years to life.

---

[3] Nevertheless, the jury had the information, in the form of the Oregon court records admitted into evidence, that Bickford had committed acts constituting rape under the law of Oregon, that he had been found guilty except for insanity, and that the victim in that case was a developmentally disabled female. It was open to the jury to consider that evidence for the purposes permitted by Evidence Code section 1108 and any other permitted purposes.

DISCUSSION

I. Rape and Sexual Penetration

Bickford contends there was insufficient evidence to prove the element of force, violence, duress, menace, or fear of immediate bodily injury for count 1 (rape) and count 2 (sexual penetration with a foreign object). When considering a challenge to the sufficiency of the evidence to support a judgment, we review the record in the light most favorable to the judgment and decide whether it contains substantial evidence from which a reasonable finder of fact could make the necessary finding beyond a reasonable doubt. The evidence must be reasonable, credible and of solid value. We presume every inference in support of the judgment that the finder of fact could reasonably have made. We do not reweigh the evidence or reevaluate witness credibility. We cannot reverse the judgment merely because the evidence could be reconciled with a contrary finding. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 293.)

For the rape count, the jury was instructed in accordance with CALCRIM No. 1000, as follows:

> "The defendant is charged in Count 1 with rape by force in violation of Penal Code section 261(a).
>
> "To prove that the defendant is guilty of this crime, the People must prove that:
>
> "1. The defendant had sexual intercourse with a woman;
>
> "2. He and the woman were not married to each other at the time of the intercourse;
>
> "3. The woman did not consent to the intercourse;
>
> "AND
>
> "4. The defendant accomplished the intercourse by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or to someone else.

"*Sexual intercourse* means any penetration, no matter how slight, of the vagina or genitalia by the penis. Ejaculation is not required.

"To *consent*, a woman must act freely and voluntarily and know the nature of the act.

"Intercourse is *accomplished by force* if a person uses enough physical force to overcome the woman's will.

"*Duress* means a direct or implied threat of force, violence, danger, or retribution that would cause a reasonable person to do or submit to something that she would not do or submit to otherwise. When deciding whether the act was accomplished by duress, consider all the circumstances, including the woman's age and her relationship to the defendant.

"*Retribution* is a form of payback or revenge.

"*Menace* means a threat, statement, or act showing an intent to injure someone.

"Intercourse is *accomplished by fear* if the woman is actually and reasonably afraid or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it.

"The defendant is not guilty of rape if he actually and reasonably believed that the woman consented to the intercourse and actually and reasonably believed that she consented throughout the act of intercourse. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman consented. If the People have not met this burden, you must find the defendant not guilty."

The instruction given for the sexual penetration offense in count 2, CALCRIM No. 1045, was similar, and the phrase "force, violence, duress, menace, or fear of immediate and unlawful bodily injury to another person" was identical.

In this case, the jury could readily make a sound inference that both the intercourse and the penetration with a foreign object (Bickford's fingers) were accomplished by force. Force in this context means force that overcomes the victim's *will* to resist; it need not be force that physically prevents the victim from resisting or that effectuates the penetration by overwhelming the victim's resistance with greater strength.

(*People v. Griffin* (2004) 33 Cal.4th 1015, 1027 (*Griffin*).) In fact, evidence of the victim's resistance is not required at all. If the force serves to deter the victim from resisting in the first place, it is sufficient force. (*People v. Barnes* (1986) 42 Cal.3d 284, 302.) L.N. testified at trial as follows:

"Q Okay. Do you remember telling Officer Ford that [Bickford] was holding onto one of your legs because you're short?

"A Yes.

"Q Okay. Did he—do you know, does that refresh your memory that he did that?

"A Yes.

"Q Okay. Can you describe how he was holding your leg?

"A Like this.

"Q So you're grabbing your right leg with your right arm?

"A Yes.

"Q Was he using his hands to open your legs?

"A Yes.

"Q Okay. And were you trying to close your legs?

"A Yeah. And they wouldn't open all the way.

"Q Okay. You were trying not to open your legs all the way?

"A (Nodding head.)

"Q And what was—what did he do when you were trying to close your legs?

"A Open them more."

L.N. testified that she said no when Bickford asked if she wanted to come to his house and have sex in his bed, and did not say yes when he indicated he wanted to have sex there on the ground behind the Walmart. Before he could penetrate her, he had to

force her legs apart. The jury could reasonably infer that L.N. had a will to resist, that Bickford forced her legs apart against her resistance to gain access to her vagina in order to insert his penis and fingers in it, and that in doing so, he overcame her will.

Bickford acknowledges the evidence that he grasped one of L.N.'s legs and forced her legs apart while she tried to hold them together. His only argument about why this was not sufficient evidence of force is this: "It is not clear from the jury's verdicts that the jurors would have found these … two actions sufficient to find appellant used force to commit the rape and penetration, particularly since the prosecutor's theory was that appellant relied on the victim's fear rather than the use of force …." But on review for sufficiency of evidence it is irrelevant what evidence the jury *actually* relied on—a matter that is, in any event, outside the record. The question is only whether evidence was presented that *any reasonable* jury *could* have relied on in finding beyond a reasonable doubt that the element in question was proved.

Bickford attempts to distinguish some cases the People rely on, but in reality they are quite similar to this case and undermine Bickford's position. In each, it was held on appeal that physical acts comparable to Bickford's forcing L.N.'s legs open constituted force for purposes of proving a forcible sex crime. (*Griffin, supra,* 33 Cal.4th at pp. 1022, 1029 [pinning victim's arms to floor]; *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 153-154 [pushing victim's hands aside when she resisted], overruled on other grounds by *Griffin, supra*, 33 Cal.4th at p. 1028; *People v. Mejia* (2007) 155 Cal.App.4th 86, 102 [persisting after victim tried to push defendant away, then pushing victim's legs apart and her knees back].)

Bickford contends that the case "most analogous" to this one is *People v. Espinoza* (2002) 95 Cal.App.4th 1287. *Espinoza* undermines nothing we have said, however, because there was no evidence in that case that the defendant used force sufficient to overcome the child victim's will; the appellate court instead analyzed (and rejected) the contention that the defendant used duress. (*Id.* at pp. 1318-1319.) Further, the key notion

on which the court relied—"'"[p]sychological coercion" without more does not establish duress'" (*id.* at p. 1321)—has been rejected, properly in our view, by at least one other Court of Appeal panel. (*People v. Cochran* (2002) 103 Cal.App.4th 8, 15 ["The very nature of duress is psychological coercion."], overruled on other grounds by *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12.)

For the above reasons, we reject Bickford's contention that insufficient evidence was presented at trial to prove counts 1 and 2.

II. Kidnapping

Bickford maintains that the evidence was insufficient to prove that he used force, fear or deception to accomplish the movement of L.N. to the place behind the store where he raped her, and, as a result, the kidnapping special circumstance findings on counts 1 and 2, and the conviction of kidnapping to commit rape on count 3, must be reversed. We agree.

On the kidnapping special circumstance, the jury was instructed with a modified version of CALCRIM No. 3175, as follows:

> "If you find the defendant guilty of the crime charged in Counts 1 and 2, you must then decide whether the People have proved the additional allegation that the defendant kidnapped L.N. increasing the risk of harm to her.
>
> "To prove this allegation, the People must prove that:
>
> "1. The defendant took, held, or detained L.N., an unresisting person with a mental impairment, by the use of force, deception, or by instilling reasonable fear;
>
> "2. Using that force, deception, or fear, the defendant moved or made L.N., a person with a mental impairment, move a substantial distance;
>
> "3. The movement of L.N. substantially increased the risk of harm to her beyond that necessarily present in the [r]ape;
>
> "4. L.N. suffered from a mental impairment that made her incapable of giving legal consent to the movement;

"AND

"5. The defendant did not actually and reasonably believe that L.N. consented to the movement.

"*Substantial distance* means more than a slight or trivial distance. The movement must be more than merely incidental to the commission of [r]ape. In deciding whether the distance was substantial and whether the movement substantially increased the risk of harm, you must consider all the circumstances relating to the movement.

"The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

The modifications from the standard instruction were: (1) the description of the victim as a person or an unresisting person with a mental impairment; (2) the addition of "deception" as one of the means by which the defendant could have caused the victim to move; and (3) the substitution of inability to consent for nonconsent.

The instruction given for the charge of kidnapping to commit rape in count 3, CALCRIM No. 1203, had similar elements, except that the movement of the victim had to be effectuated by force or reasonable fear (not force, deception or reasonable fear), and the kidnapping had to be with intent to commit rape. The jury also was instructed in accordance with CALCRIM No. 1201 on the lesser (but not included) offense of kidnapping a person incapable of consent. Under that instruction as given in this case, deception must be used. None of the instructions are challenged in this appeal.

The kidnapping instructions, unlike those for rape and sexual penetration, included no reference to taking advantage of the victim's unreasonable fear, and the parties do not discuss that concept in portions of their briefs relating to kidnapping. Nevertheless, we will assume for the sake of argument that a kidnapping finding or conviction could have been premised in this case on a determination that the defendant caused the victim to move by knowing and taking advantage of the victim's unreasonable fear.

We will consider these several means of causing a person to move—force, reasonable fear, unreasonable fear, and deception—in turn.

A. Force

There was no evidence that Bickford used force to effect the movement of L.N. to the area behind the store. The surveillance video shows Bickford and L.N. simply walking together. L.N. did not testify that she was forced.

The People mention in this connection the evidence that Bickford grasped L.N.'s leg and forced her legs open, and also that he became angry at one point while he was raping her. But these facts are relevant to the force Bickford used in committing the rape, not the kidnapping. Undoubtedly, circumstances can be conceived in which the facts of a rape itself might, along with other evidence, circumstantially support an assertion that the victim was brought to the scene of the rape by force. But we do not think they do so here, where there is video of the victim and defendant walking to the scene without any evident compulsion, and the victim did not claim to have been made to go there by physical force.

B. Reasonable Fear

L.N. testified that she went with Bickford because she was afraid he would hit her. There was expert testimony that she had been abused before, and in an encounter such as this one, she would be likely to shut down. Her subjective experience of fear of bodily harm was well supported by the evidence and Bickford does not challenge it. But before the assault, there was little evidence to support an inference that this fear was objectively reasonable. L.N. testified that she was afraid of Bickford because he looked scary, but conceded that he did not threaten her. There was no evidence that he said or did anything indicating he would try to hurt her or compel her compliance if she did not go with him.

It might be thought that her fear was reasonable because, inside and in front of the store on the day of the rape, and once previously at a bus stop, Bickford had acted toward L.N. with a sexual forwardness bizarre for a near-stranger, including making sexual

propositions and touching and kissing her without permission, the latter actions likely being criminal offenses in themselves. On the previous occasion, however, L.N. was not restrained by fear, but simply left after the encounter. On the day of the current offenses, before L.N. walked behind the store with Bickford, there was no evidence of any objective reason why she would be too frightened to do the same. They were in a public place, with other people around. In the surveillance video, where they are seen leaving the store together, no obstacle to her walking away from him appears. There is no indication that she tried to walk away and he intimidated her by following, for instance. It would certainly be reasonable for a woman to feel extremely anxious to get away from a man behaving as Bickford behaved toward L.N. in the time leading up to the rape, but that is not the same as a reasonable fear of a kind that would lead one to submit to being moved from a public place to a secluded place against one's wishes.

The People rely on *People v. Dejourney* (2011) 192 Cal.App.4th 1091, but that case does not support their position with respect to either force or fear. *Dejourney* involved the rape of a developmentally disabled woman, outdoors on the ground, by a man who kidnapped her by causing her to move from an open location to a concealed one. He did not utter any threats and she did not call out for help or try to run away. An expert testified that she would be compliant and passive in the face of aggression. But the similarities between that case and this one end there. In *Dejourney*, the victim was out shopping when she briefly spoke to the defendant, whom she had never seen before, about whether a taxi could be hailed at their location. Then she went to an ATM and made a withdrawal for taxi fare. As she walked away, the defendant came up behind her and asked if she had a boyfriend. She said she was married and he said her husband might be cheating on her. She became fearful of him then, and he grabbed her. He dragged her down the sidewalk or propelled her along with his arm around her, moving too fast for her feet to keep up (she had cerebral palsy), and taking her into dark spaces and trying to kiss and touch her. She said he could take her money if he let her go. He

took the money, but did not release her. Instead, he took her to a partially secluded area, took her underwear off, and slapped his penis against her buttocks. Next, he dragged her onto a trolley and then a bus. On the bus, she looked around when she thought they were in a place she recognized, but he stopped her by pulling her closer to him. After they got off, she went into a restaurant and asked the cashier to call 911, but then the defendant came in and she left with him. Finally, he dragged her into a trash enclosure with some dumpsters and raped her as she cried and pleaded with him to stop. (*Id*. at pp. 1094-1099.) The Court of Appeal rejected the defendant's challenge to the sufficiency of the evidence of kidnapping. (*Id.* at pp. 1115-1116.)

There was ample evidence in *Dejourney* that the defendant used both force and the victim's reasonable fear to compel her to move. A stranger, he seized her and moved her from place to place with his arms by force. When she said she wanted him to let her go, he continued holding onto her, even after taking all her money. When she tried to move independently, he grasped her more tightly. Much of what the defendant did consisted of straightforward applications of force. And, having been suddenly seized by a stranger, relieved of her money, and held against her will, the victim surely could reasonably fear that the assailant's force might escalate to violence if she tried to get away. The defendant's use of physical force and the reasonableness of the victim's resultant fear were obvious in *Dejourney*. These factors are absent in the present case.

C. Deception or Taking Advantage of Unreasonable Fear

With respect to these methods of causing a person to move, our conclusion that Bickford's action in leading L.N. behind the Walmart was not a kidnapping may appear from one perspective—that of L.N.'s disabled status—to be at odds with common sense: Even if he did not force her to go, and even if her fear of him was not objectively reasonable, still, surely she would only have gone with him under her own power if he was exploiting her self-evident naiveté or timorousness; and surely he knew what he was doing in this regard? And if so, his movement of her would have been either by

deception (exploiting her naive failure to realize that he was leading her away to insist on sex) or by knowingly taking advantage of her unreasonable fear (exploiting her timorous inclination to do as she was asked by people who might conceivably hurt her). As we will explain, however, a certain amount of speculation is necessary to sustain this line of reasoning, speculation that is not consistent with proof beyond a reasonable doubt.

Bickford knew L.N. was developmentally disabled. He also knew she did not want to have sex with him, as she had rebuffed him twice, the second rebuff having happened immediately before he began to lead her behind the Walmart. Inside the Walmart, he had hugged and kissed her and touched her breasts, without receiving any sort of invitation or encouragement from her, even though they had only the slightest acquaintance with each other. He led her behind the store with the goal of having sex just after she said she did not want to have sex. All this is consistent with an intention on his part to take advantage of the chance either that she would react to him with fear—as in fact she did—or that she would be unduly trusting and believe he had accepted her refusal of his proposition and now only wanted to go somewhere quiet to talk, or something of the kind. Thus he could have been knowingly taking advantage of her fear, or using deception.

But there are other explanations for his behavior, equally consistent with the evidence, that would not support a finding that Bickford kidnapped L.N. when he led her behind the store. He could have been oblivious to the possibilities that she was acting from fear or from being deceived as to his intentions, and could instead have believed she was ambivalent, and was considering having consensual sex with him, despite her previous rejections. It is also possible that he never formed any particular notion about what might motivate her to follow him, but simply encouraged her to walk along with him and found that she did. That Bickford was himself once found to have a mild intellectual disability—a fact mentioned in the Oregon records that were admitted into evidence—would support hypotheses such as these.

The jury would have had no way to choose among these explanations without speculating. If it is necessary to speculate about which of several possibilities is the case, we cannot say any one of them was established beyond a reasonable doubt.

Further, it cannot be said that the evidence established deception beyond a reasonable doubt because L.N. testified that she went with Bickford because she was afraid, not because she was deceived. It also cannot be said that the evidence established beyond a reasonable doubt that Bickford knew and took advantage of L.N.'s fear. It may be *probable* that he *suspected* she was afraid, given his prior experience of victimizing a developmentally disabled woman, but there is nothing in the record to support an inference *beyond a reasonable doubt* that he knew this and intended to exploit it. L.N.'s explanation of why she was afraid was that he looked scary to her, not that he did something to inspire fear; and she did not testify that she made any outward sign of her fear. Despite our intuitive inclination to believe—in light of the outcome—that Bickford must have been doing something unlawful when he induced L.N. to follow him behind the store, the evidence did not *show* he did anything more to accomplish that goal than ask her to go with him.

For these reasons, we conclude the prosecution did not prove Bickford used force, fear or deception to move L.N. behind the store. Therefore, the conviction on count 3 and the special circumstance findings on counts 1 and 2 must be reversed.

Bickford also argues that there was insufficient evidence that L.N. could not or did not *consent* to the movement. He says there was evidence she could not consent to have sex with him, but not that she could not consent to other things, such as a change of location. Because of our holding, we need not address this contention.

Finally, Bickford was 50 years old at the time of the offenses in this case. The two consecutive indeterminate sentences of 25 years to life on counts 1 and 2, based on the special circumstance findings we are reversing, meant he would not likely have been released from prison during his lifetime. We are mindful of the facts that our holding

creates a possibility that he will be released during his lifetime, that he remained dangerous after 20 years in a state hospital, and that he may still be so after a term in a state prison. These facts do not mean, however, that the public must again be exposed to danger. If Bickford remains dangerous due to a mental disorder if and when he is released from prison, it will be open to the People to seek a civil commitment order pursuant to the Sexually Violent Predators Act (Welf. & Inst. Code, § 6600 et seq.).

III. Clerical Error

The parties agree that the abstract of judgment for the determinate part of Bickford's sentence should be amended to state that the total determinate sentence is four years, not 54 years. Our holding renders this point moot.

DISPOSITION

The section 667.61, subdivision (d)(2) special circumstance findings on counts 1 and 2, and the conviction on count 3, are reversed due to insufficient evidence. The case is remanded to the trial court for resentencing.

_____
SMITH, J.

WE CONCUR:

_____
FRANSON, Acting P.J.

_____
SNAUFFER, J.